Supreme Court, U.S.
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No. 98-1072

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In The

Supreme Court of the United States

October Term, 1998

PAUL E. PATTON,

Cross-Petitioner,

v.

ROBERT E. GABLE, A.B. CHANDLER, III, KENTUCKY REGISTRY OF ELECTION FINANCE, DONALD L. COX, MORRIS E. BURTON, JAMES E. BOYD and JOHN Y. BROWN, III,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED FOR REVIEW

Cross-Respondent Robert Gable has petitioned this Court for a Writ of Certiorari on two questions relating to the constitutionality of Kentucky's campaign finance law. Pet. at i. Should the Court grant the Petition, Cross-Petitioner Paul E. Patton, Governor of Kentucky, respectfully requests this Court's review of the following third question relating to the constitutionality of an essential component to the same legislation:

Whether it is constitutional to induce candidates to participate in a voluntary system of public financing by prohibiting a gubernatorial candidate from waiting until after the final preelection reporting deadline to make personal contributions to her own campaign in excess of the voluntary spending limits.

PARTIES TO THE PROCEEDING

The cross-petitioner in this Court is Paul E. Patton, Governor of the Commonwealth of Kentucky, who was also the defendant-appellee/cross-appellant below. Cross-respondents are Robert Gable, who was plaintiff-appellant/cross-appellee below, and A.B. Chandler, III, Kentucky Registry of Election Finance, Donald L. Cox, Morris E. Burton, James E. Boyd, and John Y. Brown, III, all of whom were defendant-appellees/cross-appellants below, and are respondents to the opening Petition.

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OPINIONS BELOW

The Opinion of the court of appeals is reported at 142 F.3d 940 (6th Cir. 1998), and is attached to the Petition for a Writ of Certiorari at Appendix 1a. The Opinion of the district court is unreported and is attached to the opening Petition for a Writ of Certiorari at Appendix 28a.

JURISDICTION

This Conditional Cross-Petition for a Writ of Certiorari incorporates the Jurisdiction statement set forth in the opening Petition with the following additions. The opening Petition in this action was docketed with the Supreme Court on November 30, 1998. This Conditional Cross-Petition is timely, and hence this Court has jurisdiction, pursuant to Supreme Court Rule 12.5.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Cross-Petitioner Governor Patton concurs with the statement of Constitutional Provisions and Statutes Involved contained in the original Petition.

STATEMENT OF THE CASE

The court of appeals and the district court before it upheld the constitutionality of all but one component of

Kentucky's campaign financing reform system. This Conditional Cross-Petition seeks review of the constitutionality of that discreet, yet vital, provision of a law which works to prevent corruption and preserve public confidence in the election process by providing incentives to encourage candidates to accept voluntary spending limits.

Against the backdrop of a history of political corruption in state elections, the Kentucky General Assembly in 1992 enacted campaign finance reforms. The reforms were designed to restore and protect the integrity of elections in this Commonwealth. Central to the legislation was public financing for candidates, a legally established means for limiting a candidate's aggregate contributions and expenditures. *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

Participation in Kentucky's public financing program, and its attendant expenditure limits, is entirely voluntary. The legislation encourages participation, however, by matching $2 in public funds to each $1 of privately raised funds for gubernatorial slates choosing to accept public financing ("Participating Slates"). 121A.060(3)(c). Participating Slates voluntarily accept a limit on private contributions in each of the primary and general elections of $600,000, making a maximum of $1.2 million available in matching funds, for a total voluntary spending limit of $1.8 million for Participating Slates in each election. KRS 121A.080(1).

Gubernatorial slates electing not to accept public financing ("Nonparticipating Slates") are not limited by

the $1.8 million spending limit. However, if a Nonparticipating Slate accepts more than $1.8 million in contributions in a primary or general election campaign, it will "trigger" the suspension of the spending limit on an opposing Participating Slate ("the Trigger"). KRS 121A.030(5). The Participating Slate may then resume accepting contributions in excess of the limit. To insure that a Participating Slate will continue to be less dependent on donors, it will continue to receive the $2 for $1 match of public funds once the Trigger has been pulled and the limit has been lifted.

For the Trigger provision to have any practical effect, there must be a mechanism through which to determine when a Nonparticipating Slate has accepted contributions exceeding the $1.8 million limit. This determination must be made sufficiently prior to the election to allow a Participating Slate a meaningful opportunity to resume its own fundraising. Otherwise, the Trigger would be ineffective and, consequently, candidates would be deterred from accepting public financing and voluntary spending limits.

Accordingly, the legislation regulates the time period in which slates may accept contributions by prohibiting any gubernatorial slate (whether Participating or Nonparticipating) from knowingly accepting any campaign contribution after the final preelection reporting deadline, which is 28 days before a primary or general election[1]

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[1] The final preelection reporting period is 28 days before a primary or general election, or 14 days before a run-off primary. *See* KRS 121A.030(5). The 1996 General Assembly changed the timing window from 30 days to 28 days to have it coincide with

("the 28-Day Timing Window"). KRS 121A.030(5). However, if a Nonparticipating Slate "pulls" the Trigger by accepting contributions in excess of the $1.8 million limit, all slates may resume accepting contributions during the 28-Day Timing Window.

Robert E. Gable, original Petitioner and Cross-Respondent in this action, was an unsuccessful candidate for the 1995 Republican nomination for Governor of Kentucky. Gable elected not to receive transfers from the public fund and therefore was not subject to the $1.8 million spending limit in Kentucky's campaign finance reform legislation. His slate was subject to the reporting requirements and timing restrictions for contributions during the 28-Day Timing Window. Gable filed suit in the United States District Court for the Eastern District of Kentucky challenging the constitutionality of numerous provisions of Kentucky's campaign finance reform law. Defendants included the Kentucky Registry of Election Finance as the agency responsible for enforcement of the legislation, Governor Paul E. Patton, and other state and local officials.

On March 29, 1996, the district court, pursuant to 28 U.S.C. §§ 1331 and 1343, declared constitutional all but a portion of one of the law's provisions. Pet. App. at 28a. While recognizing that this Court in *Buckley v. Valeo* never addressed the question of "whether a 'time' restriction limiting when a candidate may contribute to his own campaign is constitutionally permissible," the district

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the due date of the campaign finance report. *See* HB 130 (1996) p. 4, 1996 Ky. Acts ch. 102 and ch. 153, secs. 2 and 12.

court nonetheless relied on *Buckley* to enjoin enforcement of KRS 121A.030(5) to the extent it prohibits a candidate from contributing to her own campaign during the 28-Day Timing Window. Pet. App. at 31a-33a. Both sides appealed. On April 30, 1998, the United States Court of Appeals for the Sixth Circuit affirmed the district court judgment in *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998). Pet. App. at 1a. Both sides petitioned for rehearing and rehearing en banc, which the court of appeals denied on July 28, 1998.

The court of appeals unanimously upheld the Trigger provision of the campaign finance legislation as an inducement which is narrowly tailored to further Kentucky's compelling interest in eliminating actual and perceived corruption in the election process. Pet. App. at 15a. The court also unanimously upheld the 28-Day Timing Window insofar as it prohibits contributions by third parties to the candidate during the 28 days preceding the election. In so doing, the court explicitly recognized that the Window forms an important part of the public financing scheme and merely requires candidates to "rearrange their fundraising by concentrating it in the period before the 28-Day Window begins." Pet. App. at 19a.

By a two to one vote, the court of appeals, while professing sympathy for its administrative goals, found that the 28-Day Timing Window was unconstitutional insofar as it prohibits contributions by a candidate to her own campaign during the 28 days preceding the election. Pet. App. at 24a. The majority relied entirely on *Buckley v. Valeo* in reaching its decision, though conceding "one possible distinction between the 28-Day Window and the

internal expenditure provisions struck down in *Buckley*." Pet. App. at 20a.

> Although *Buckley* pointed out that a candidate's use of his own money does not lead to corruption, Kentucky's interest in preventing actual and apparent corruption is served by the 28-Day Window's application to internal expenditures, albeit indirectly. Extension of the 28-Day Window to internal expenditures increases the effectiveness of the Window, which increases the effectiveness of the Trigger, which, in turn, strengthens the incentives for participating in Kentucky's campaign finance scheme, a scheme which is clearly aimed at the prevention of actual and apparent corruption.

Pet. App. at 20a.

By separate Opinion, Circuit Judge Cudahy concurred with the panel on all points except for that part of the majority opinion which invalidates the 28-Day Timing Window as it applies to internal contributions by candidates. His dissent took issue with the majority's reliance on *Buckley's* prohibition against *direct* quantity restrictions on political communication, stating that the Kentucky provision affects only *when* contributions are made, not how much.

> Nor does the 28-Day Window involve the evil at which *Buckley* was aimed. *Buckley* was concerned that a candidate not be prohibited from contributing to, and spending money on, her own candidacy. *See id.* at 52-53. Certainly that freedom is not at stake here. Candidates are free to make contributions, as frequently as they wish and of whatever magnitude they choose, before the advent of the 28-Day Window.

Pet. App. at 260.

Judge Cudahy recognized that "[a]ll the 28-Day Window provides is *notice* that the contribution has been made and an opportunity for the opponent to respond." Pet. App. at 26a (emphasis in original). As a result, the Window "removes the unfairness of last-minute, unreported contributions." Pet. App. at 26a.

> In sum, the majority is troubled that the 28-Day Window is a "burden" on a candidate's freedom to speak with her own dollars. But the alternative is to construct a special right to speak with unreported dollars at the last minute when no response is possible. I do not believe that the First Amendment requires such a perverse construction, and I therefore respectfully dissent with respect to this issue.

REASONS FOR GRANTING CONDITIONAL CROSS-PETITION

In his opening Petition docketed with the Court on November 30, 1998, Petitioner/Cross-Respondent Gable urges the Supreme Court to re-examine the constitutionality of Kentucky's campaign finance reform framework, specifically the law's "Trigger" provision and the application of its "28-Day Timing Window" to outside contributions. Should the Court in its discretion determine that Petitioner Gable has presented compelling reasons for review and accordingly grants the Petition, then the Court also should grant this Conditional Cross-Petition. All of Petitioner Gable's stated reasons for review must and do apply with equal force to this Cross-Petition. In short, if Kentucky's campaign finance reform law is to

be reevaluated at all, it should be evaluated in its entirety, with all its essential working components.

The Petition states that "[t]his case raises issues of national importance that were not resolved by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)." Pet. at 6. Certainly this sweeping generalization applies with equal force to the question at issue in this Conditional Cross-Petition – namely, whether the First Amendment precludes a law that prohibits a gubernatorial candidate from making contributions to her own campaign after the final preelection reporting deadline. The purpose and ultimate effect of the timing requirement is to provide publicly funded candidates adequate time to respond with additional fundraising when their privately funded opponent has accepted contributions in excess of the voluntary spending limits.

Every court that has ruled on Kentucky's timing limitations on candidate contributions has conceded to varying extents that *Buckley* does not speak directly to the issue. *See supra* at 4-6. As the court of appeals dissent most cogently points out, the *Buckley* decision only invalidated a ceiling on a candidate's expenditure of her own money. It did not even address, much less invalidate, any other regulation of the candidate's contributions of money to her campaign.

Because *Buckley* held only that candidates cannot be limited in the *amount* of their own money spent in support of their campaigns, that holding is inapplicable in this case. *Buckley* said nothing about "time, place or manner" regulations that might limit *when* candidates could

make those contributions. In *Buckley*, the Court explained:

> [T]he critical difference between this case and . . . time, place, and manner cases is that the present Act's contribution and *expenditure limitations impose direct quantity restrictions* on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed. *A restriction on the amount* of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley, 424 U.S. at 18-19 (emphasis added).

The 28-Day Timing Window does not restrict the amount of the candidate's own money which he may spend on "speech" supporting his candidacy. Nonparticipating Slates may spend as much as they please. They merely have to inform the Registry of Election Finance prior to the 28-Day deadline that they intend to spend more than the voluntary limit, thereby pulling the Trigger. Unlike the expenditure limitations at issue in *Buckley*, the 28-Day Timing Window regulates only the time in which the candidate's money must be deposited to the candidate's campaign account and reported. The candidate continues to be free to expend as much as he wishes on his campaign during the 28 days preceding the election. As Judge Cudahy recognized in his dissent:

> To justify its result, the majority is not, as it claims, merely applying *Buckley v. Valeo*, 424

> U.S. 1 (1976). Instead, the majority is extending that case in a fashion that *Buckley* specifically forecloses. As the majority concedes, *Buckley* authorizes "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication," provided that the regulations do not impose "*direct* quantity restrictions on political communication and association." 424 U.S. at 18 (emphasis added). . . .

Pet. App. at 25a.

Based on the foregoing, and using Petitioner Gable's own reasoning, it is clearly a matter of national importance for this Court to clarify whether the 28-Day Timing Window is a reasonable, and hence constitutional, time, place, and manner regulation that furthers Kentucky's interest in combating corruption and upholding the integrity of its election process.

Petitioner Gable cites to several state initiatives relating to campaign finance reform and suggests that the Court should clarify the application of *Buckley* to such reform measures to "avoid multiple, disruptive lawsuits over the next electoral cycle." Pet. at 7. To the extent this Court's review would be helpful in that regard, it would likewise be helpful in clarifying the extent to which a state may restrict the timing of a candidate's contributions to her own campaign to assure the effectiveness of its entire public financing framework. All of the initiatives cited by Petitioner Gable include some type of disclosure or notification requirement whereby a candidate who voluntarily participates in spending limits is

afforded sufficient notice that a nonparticipating opponent has exceeded those limits. For instance, the California statute, cited in the Petition, raises the spending limit for participating candidates once a nonparticipating candidate has cash on hand or spends an amount equal to a certain percentage of its ceiling. Cal. Gov. Code § 85404. To effectuate that measure, the statute requires "candidates and independent committees to provide sufficient notice to the commission and to all candidates for the same office that they are approaching and exceeding the thresholds set forth in this section." *Id.*

Kentucky's 28-Day Timing Window is in effect nothing more than a "notice" requirement similar to one in the California statute.[2] As Judge Cudahy explained in his dissent, "[a]ll the 28-Day Window provides is *notice* that the contribution has been made and an opportunity for the opponent to respond." Pet. App. at 26a. The timing restriction assures Participating Slates that they will not be surprised by "last-minute, unreported contributions" by wealthy opponents that cannot be countered by their own fundraising and matching funds. Truly, if a candidate were allowed to spend millions of dollars after the final report of contributions was filed, there would be no way to afford a Participating Slate any meaningful opportunity to respond. Without the reassurance of the 28-Day Window, few candidates would agree to accept the campaign spending limitations required by the statute and

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[2] The Window does not impose any kind of ceiling on the amount of money a nonparticipating candidate can contribute to his campaign. It only requires sufficient notice so to give a publicly funded candidate the opportunity to respond. In this instance, the Kentucky legislature has determined that a 28-day notice is sufficient to achieve that goal.

thereby risk being outspent by wealthy opponents months later, in the final days before the election. If the 28-Day Timing Window cannot be applied to a candidate's personal contributions to her own campaign, the entire framework of voluntary spending limits becomes virtually unworkable.

CONCLUSION

Petitioner Gable asks this Court to exercise its judicial discretion and review the constitutionality of selected provisions of Kentucky's campaign finance law. Cross-Petitioner Governor Patton respectfully submits that granting Petitioner's writ alone would leave unresolved a critical issue concerning a state's ability to provide essential incentives to ensure the effectiveness of its reform law and to protect its interest in promoting public financing.

Respectfully submitted,

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BRIEF IN OPPOSITION TO CROSS-PETITION

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1099

QUESTION PRESENTED

Was the court of appeals correct to hold that a total ban on a candidate's expenditure of personal funds on his own campaign during the twenty-eight days preceding an election violates the candidate's rights of free speech and association?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 142 F.3d 940 (6th Cir. 1998), and is reprinted in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at Pet. App. 1a. The opinion of the district court is unreported, and is reprinted in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at Pet. App. 28a.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. Petitions for rehearing were denied on July 28, 1998. The petition for certiorari in *Gable v. Patton*, No. 98–897, was docketed in this Court on November 30, 1998. The cross-petition was docketed in this Court on December 31, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition for Certiorari in *Gable v. Patton*, No. 98–897, at 2.

STATEMENT OF THE CASE

Kentucky law prohibits all slates of candidates for Governor and Lieutenant Governor, including those who elect not to participate in the state's public financing scheme, from accepting any contributions during the twenty-eight days preceding a primary or general election. Ky. Rev. Stat. § 121A.030(5). This prohibition applies to candidates' expenditures of their own funds upon their own campaigns as well as to contributions from outside sources. Pet. App. 4a. The question presented for review in the cross-petition, Cross-Pet. at i, incorrectly suggests that this prohibition extends solely to a candidate's "personal contributions to her own campaign *in excess of the voluntary spending limits*" (emphasis added). But the prohibition is not so limited; it bars any expenditure of the candidate's own funds in the twenty-eight days before an election regardless of how much that candidate has spent before that period begins.

In reviewing the constitutionality of this twenty-eight day "window," both the district court and the court of appeals distinguished its effects on candidates' expenditure of personal funds from its effects on contributions from outside sources. In a portion of the decision below that petitioner/cross-respondent Gable challenges in his

petition for certiorari, the court of appeals held that "the 28-day Window is constitutional with respect to external contributions." Pet. App. 19a. The court reasoned that, while "the application of *Buckley* to the instant case is far from straightforward," forcing candidates to "rearrange their fundraising by concentrating it in the period before the 28-Day Window begins" was "justified by Kentucky's interest in combating corruption." Pet. App. 19a.

But the court of appeals reached the opposite conclusion with respect to internal expenditures, holding that "the 28-Day Window is unconstitutional when it prohibits a non-participating candidate from contributing to his own campaign." Pet. App. 24a. The court accepted that "'[t]he central holding'" in *Buckley v. Valeo*, 424 U.S. 1, 54 (1976), "'is that spending money on one's own speech must be permitted.'" Pet. App. 20a (quoting *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2321 (1996) (Kennedy, J., concurring in the judgment and dissenting in part)). The court likewise acknowledged that restrictions upon expenditures of political funds impose a far greater burden on free speech than do restrictions upon political contributions. Pet. App. 21a. And the court found Kentucky's spending ban indistinguishable "from the internal expenditure provision struck down in *Buckley*." Pet. App. 24a.

The court of appeals rejected outright Kentucky's efforts to depict its twenty-eight-day spending ban as a mere "financial technicality," Pet. App. 22a, or "'time, place and manner restriction.'" Pet. App. 23a. To the contrary, the court held, the effects of the spending ban on a candidate's campaign are "substantial, rather than just being a matter of timing." Pet. App. 23a. As the court elaborated:

> [The ban] forces a candidate to decide in advance how much of his own money he will spend, before he has a chance to assess the public opinion polls and actions of his opponents in the last month of the campaign. Moreover, it would simply not be feasible for a candidate to deposit virtually all of his personal resources in the campaign account in

> advance, just in case he decides, during the last twenty-eight days, to spend those resources on his campaign. . . . [I]t is unlikely that all of the candidate's personal resources will be liquid. . . . [And] the candidate cannot easily take back his money if it is unexpended at the end of a campaign [see Ky. Rev. Stat. § 121.180(10)]. In sum, it is disingenuous for Defendants to argue that the 28-Day Window does not burden a candidate's ability to spend personal funds on his own campaign.

Pet. App. 22a-23a (footnote omitted). Accordingly, the court of appeals held itself bound by this Court's "clear statement that 'the First Amendment simply cannot tolerate' this type of restriction on the freedom of a candidate to speak on his own behalf." Pet. App. 24a (quoting *Buckley*, 424 U.S. at 54).

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition raises no novel or pressing issue worthy of this Court's review. Contrary to cross-petitioner's assertions, the issue presented in the cross-petition *was* resolved by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), as the court below correctly decided. *Buckley* established unambiguously that limitations upon political expenditures trigger strictest scrutiny. It also made clear that such limitations cannot be justified by any interest in preventing corruption or the appearance of corruption, since a candidate cannot possibly corrupt himself, nor by any interest in equalizing the amounts of money spent by various candidates in a campaign, since such an interest is "wholly foreign to the First Amendment," 424 U.S. at 45.

Because the legal principle *Buckley* established with respect to political expenditures is so clear, the cross-petition stands or falls on its attempt to distinguish *Buckley* on the facts. As cross-petitioner would have it, Kentucky has not limited "the *amount* of money" that candidates may spend in support of their own campaigns, Cross-Pet. at 8, but rather merely "the time in which the candidate's money must be deposited to the candidate's campaign account and reported," Cross-Pet. at 9.

As the court of appeals correctly observed, however, this attempted distinction is "disingenuous." Pet. App. 23a. An absolute ban upon political expenditures during the last month of an election campaign limits the quantity, not merely the timing, of a candidate's speech. It irrevocably forecloses a candidate's expenditure of funds to respond to late-breaking events in a campaign. It irrevocably bars him from using his own money to respond to an opponent's unanticipated negative attacks. It irrevocably bars him from using his own money to state his position on unanticipated developments in the news or unanticipated policy initiatives announced by the incumbent government. It irrevocably bars him from using his own funds to announce new endorsements as a campaign draws to a close. In short, it imposes upon a candidate an irreversible penalty for failing to be a perfect clairvoyant one month before an election.

Kentucky's law thus imposes a "direct quantity restriction on political communication" that is necessarily prohibited by this Court's decision in *Buckley*, 424 U.S. at 18. To call the twenty-eight-day ban on expenditures a "time" regulation is wordplay. Unlike classic time regulations such as bans on soundtrucks after midnight, which aim at ends such as residential tranquility that are unrelated to the suppression of free expression, Kentucky's law aims quite intentionally at the restriction of speech. As cross-petitioner Patton frankly admits, Kentucky's goal is to protect candidates who participate in its public financing scheme from "be[ing] surprised by" expenditures on speech "by wealthy opponents" in the late stages of a campaign. Cross-Pet. at 11. Such a goal is obviously related to the suppression of free expression. In short, the month-long Kentucky ban is no more a mere timing restriction on political speech than a law that authorizes the publication of newspapers or books on politics during only eleven months of the year.

Even if the Kentucky law were characterized as a mere time restriction on electoral speech, this Court's decisions make clear that restrictions inhibiting political speech during a time period close to an election are highly suspect. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating early filing deadline for independent candi-

dates); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating durational residency requirement for voting); *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating twenty-four-hour blackout of political editorials on election eve). *See also Harman v. Forssenius*, 380 U.S. 528, 539 (1965) (noting that poll taxes that had to be paid "long before the election" penalized those "voters who did not plan so far ahead"). For this reason, even independent of *Buckley*, the result reached by the court of appeals with respect to internal expenditures was correct.

Finally, resolution of the question presented in the cross-petition is not a pressing matter of national importance. Kentucky is unable to name a single other state that has imposed such a substantial restriction on personal expenditures by a candidate in the weeks preceding an election as the one struck down below. The California law that it cites, for example, merely requires nonparticipating candidates to provide "sufficient notice" that they are approaching the spending ceilings imposed upon participating candidates, Cal. Gov. Code § 85404 (cited in Cross-Pet. at 11), and cross-petitioner neglects to mention that the only court yet to review California's campaign finance scheme has enjoined its key provisions as presumptively unconstitutional. *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998); *aff'd*, 1999 U.S. Lexis 16 (9th Cir., Jan. 5, 1999). Accordingly, there is no danger of electoral disruption or confusion if the decision of the court of appeals with respect to internal expenditures is left standing.

CONCLUSION

In contrast to the issues presented in the petition for certiorari in *Gable v. Patton*, No. 98–897, the issue presented in the cross-petition is resolved by *Buckley* and does not warrant this Court's review. Thus, if this Court grants the petition, it should nonetheless deny the cross-petition.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

PAUL E. PATTON,

Cross-Petitioner,

v.

ROBERT E. GABLE, A.B. CHANDLER, III, KENTUCKY REGISTRY OF ELECTION FINANCE, DONALD L. COX, MORRIS E. BURTON, JAMES E. BOYD and JOHN Y. BROWN, III,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF CONDITIONAL CROSS-PETITIONER

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REPLY BRIEF OF CONDITIONAL CROSS-PETITIONER

The request in the Conditional Cross-Petition is grounded on principles of fundamental fairness and simple judicial efficiency. If this Court is to re-evaluate the constitutionality of Kentucky's campaign finance reform law as requested by original Petitioner Gable, such review, to be effective at all, must encompass all the law's essential working components. Mr. Gable's response urges on the Court a remarkable double standard of review that would carve out from this case, and hence leave unresolved, the critical issue concerning a state's right to effectively promote its campaign finance reform. His flawed analysis and misstated facts warrant this reply.

First, Mr. Gable insists on mischaracterizing the nature and effect of the 28-Day Timing Window on internal contributions. It does not bar *expenditures* at all. Non-subsidized candidate slates can spend as much as they wish whenever they wish. Further, candidates can contribute as much as they wish to their own slate's campaign. The only regulation imposed by the 28-Day Timing Window relates to the time in which candidates' money must be deposited into the campaign account. Without such a notice requirement, subsidized candidates cannot be afforded "meaningful participation" in the election process.

Respondent at no time disputes the devastating effect that removing the 28-Day Timing requirement on internal contributions would have on Kentucky's campaign finance system. Judge Cudahy, dissenting from his two

colleagues below, stated the "invalidation threatens to derail this reform effort." Pet. App. at 24a. Without the limitation, Judge Cudahy predicted that self-financed candidates such as Mr. Gable would be "free to ambush an adversary with a torrent of new cash after the last reporting deadline, when a response is no longer possible." Pet. App. at 25a. "A provision that forbids this unfair practice should not require a defense." *Id.*

Second, Mr. Gable's unequivocal contention that "the issue presented in the cross-petition was resolved by this Court's decision in *Buckley v. Valeo*," 424 U.S. 1 (1976), misapprehends both the issue in this case and in *Buckley*, and flatly ignores concessions to the contrary in the courts below. Response at 4. *Buckley* addressed limits on the **amount of expenditures** candidates can make in support of their own campaigns. As the district court conceded, *Buckley* does not address "whether a 'time' restriction limiting when a candidate may contribute to his own campaign is constitutionally permissible." Pet. App. at 32a. And, as the court of appeals majority acknowledged, the 28-Day Window is distinguishable from the *Buckley* limitation in that the Window's application to candidate contributions strengthens incentives for participation in Kentucky's campaign finance scheme," which is clearly aimed at the prevention of actual and apparent corruption of the political process. Pet. App. at 20a. *See also* Pet. App. at 24a-27a, where dissenting Judge Cudahy distinguishes *Buckley* on several other fronts. Accordingly, when Mr. Gable tells this Court in his original Petition that "[t]his case raises issues of serious national importance that were not resolved by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)," one

of those issues must be whether the 28-Day Timing Window on internal contributions is constitutional. Pet. at 6.

Perhaps most disturbing in the response is the proffered double standard for certiorari worthiness. In his original Petition, Mr. Gable tells this Court that "a growing number of states are adopting novel schemes" relating to campaign finance controls and that "whether such measures unconstitutionally penalize nonparticipating candidates' rights to spend political money free of government-imposed limits is an issue requiring this Court's urgent resolution." Pet. at 6-7. In the response to Governor Patton's Cross-Petition, however, Mr. Gable states that a question relating to the constitutionality of an integral component of Kentucky's so-called novel scheme is "not a pressing matter of national importance." Response at 6. And, although he claims the issues he presents concerning the same statute may produce electoral disruption and confusion, he finds no such danger vis-a-vis the constitutionality of the 28-Day Timing Window on internal contributions. The inconsistency is simply irreconcilable.[1]

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[1] Indeed, Mr. Gable chastises Cross-Petitioner Governor Patton for citing to a California statute and neglecting to mention an ongoing court challenge to its constitutionality. This rebuke is remarkable in light of the fact that it was Gable himself who relied on Cal. Gov. Code § 85404, without mention of the litigation, in his original Petition to support his premise that this Court's oversight is needed to resolve constitutionality issues raised in the "growing number" of campaign finance laws in effect or under consideration in California and other cited states. Governor Patton's reliance on Mr. Gable's own cited authority merely points out the similarity between the notice requirement in the California law and the internal contribution

In sum, Mr. Gable offers no credible support for his request that this Court's review of Kentucky's campaign finance law, if granted, be piecemeal. To be sure, the only way to achieve the goals of consistency and order promoted so vigorously in the original Petition is for this Court, should it grant the Petition, also to grant the Cross-Petition and decide *all* issues relating to the constitutionality of the Trigger provision and the 28-Day Timing Window.

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timetable in Kentucky's. To say that reference to ongoing litigation is required of the Cross-Petitioner but not the Petitioner is but one example of Mr. Gable's double standard. Further, contrary to Mr. Gable's suggestion, the court of appeals in *California Prolife Council Political Action Committee v. Scully*, 1999 WL 2549 (9th Cir., Jan. 5, 1999), made no decision with respect to internal expenditure provisions of § 85404. It simply affirmed the district court's issuance of a preliminary injunction and ordered a full trial on the merits, explicitly refusing to review whether the result reached by the district judge was correct.

CONCLUSION

For the reasons stated above, the Court should grant the Conditional Cross-Petition for writ of certiorari.

Respectfully submitted,

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